

National Association of Home Builders

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December 10, 2009

Mr. Edward A. Boling
Chief FOIA Officer
Council on Environmental Quality
722 Jackson Place, N.W.
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**RE: Comments by the National Association of Home Builders
Regarding Notice of Proposed Rulemaking, Revision of
Freedom of Information Act Regulations, RIN 0331-ZA01, 74
Fed. Reg. 58576**

Dear Mr. Boling,

On behalf of the National Association of Home Builders, thank you for the opportunity to provide comments on the Notice of Proposed Rulemaking regarding Revision of Freedom of Information Act Regulations for the Council on Environmental Quality ("CEQ"), published in the Federal Register on November 13, 2009.¹

The National Association of Home Builders ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. As the "voice of America's housing industry," NAHB helps promote policies that will keep housing a national priority. A federation of more than 800 state and local associations nationwide, NAHB's membership includes over 200,000 members who will construct about 80 percent of the new homes built each year in the United States.

NAHB's various groups analyze policy issues, take the industry's story to the public through the media and other outlets, monitor and work toward improving the housing finance system, and analyze and forecast economic and consumer trends. They also provide a wide range of services to members and Home Builder Associations. NAHB also represents the industry's interests on Capitol Hill and strives to ensure that housing remains a national priority when laws are made and policies are established. NAHB also works with federal agencies on regulations affecting the housing industry in areas such as mortgage finance, codes, energy and the environment.

¹ Revision of Freedom of Information Act Regulations for the Council on Environmental Quality, 74 Fed. Reg. 58,576 (proposed Nov. 13, 2009) (to be codified at 40 C.F.R. pt. 1515) ("NPRM" or "proposed regulations").

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Residential construction is a highly regulated industry and home builders comply with numerous federal, state and local statutes and regulations during the course of operating their businesses. Because activities in Congress, the federal agencies, the courts, and state and local governments affect residential construction at all levels, NAHB remains actively engaged on many fronts to ensure that its members receive up to date information and education on changing regulations and laws. As part of its advocacy efforts, NAHB uses the Freedom of Information Act to obtain information on activities from various federal agencies in order to assist its membership in obtaining current information on agency regulations, policies and guidelines.

NAHB generally supports the proposed regulatory changes CEQ put forth in its Notice of Proposed Rulemaking as published in the November 13, 2009 Federal Register. Overall, it appears that the NPRM is designed to facilitate greater access and public disclosure of information, while at the same time requiring CEQ to articulate a justification when access to requested information is withheld. The public in general and FOIA requesters will greatly benefit from these proposed changes. There are, however, several sections within the NPRM that need clarification.

First, NAHB is encouraged that CEQ is responding to the Presidential Memorandum of January 21, 2009,² and the Attorney General's March 19, 2009 FOIA policy guidance,³ directing the heads of executive departments and agencies to increase transparency within the federal government and apply a presumption of disclosure in the Freedom of Information Act ("FOIA") process. CEQ states in its NPRM that it is "commit[ted] to providing the fullest possible disclosure of records to the public by revising its FOIA regulations." 74 Fed. Reg. at 58,576. However, CEQ has proposed deleting section 1515.10(c) from its existing regulations. See Section 1515.10(c), 74 Fed. Reg. at 58,579 ("Accordingly this section is deleted."). The existing code section reads in part, "the Council will consider the release of an entire record, even if it comes within an exemption or contains policy advice, if its disclosure would not impair Executive policymaking processes or the Council's participation in decisionmaking." 40 C.F.R. § 1515.10(c). In fact, CEQ makes no mention of a presumption of openness, full disclosure or increased transparency anywhere in its proposed revisions to 40 C.F.R. § 1515. NAHB feels this requires correction.

Second, NAHB notes that the "section-by-section" analysis in the NPRM states that CEQ proposes to shorten the time for a requester to file an appeal from **45 days to 30 days** once the agency denies a request. See NPRM Analysis Section 1515.8(a), 74 Fed. Reg. at 58,578 – 58,579 (emphasis added). However, in reviewing the actual proposed regulatory language (found under Section 1515.8(a) on page 58,582 of the Federal Register notice), the time period states,

² Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683 (January 26, 2009) ("Presidential Memorandum").

³ U.S. Dept. of Justice, Attorney General's Memorandum for Heads of Executive Departments and Agencies on The Freedom of Information Act (FOIA) (March 19, 2009).

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"any appeal must be received by CEQ *within 60 days* of the date on the CEQ letter denying the request." Section 1515.8(a), 74 Fed. Reg. at 58,582 (emphasis added). Moreover, the existing Code of Federal Regulations dealing with appeals states, "You must make you [sic] appeal *within 45 days* of the date on the letter which denied your request." 40 C.F.R. § 1515.5(d)(1) (emphasis added). Because of all of these conflicting periods, NAHB requests that CEQ clarify which time frame it *actually* proposes in these updated regulations. Since the existing regulations allow for 45 days for an appeal, NAHB would not object to a shortened time period of 30 days for filing an appeal as long as CEQ clarifies the specific time allowed in the proposed regulations, and corrects the proposed language to reflect the actual period it proposes.

Third, NAHB notes that the proposed regulations would allow requesters to file written appeals by electronic mail or facsimile. Section 1515.8(b), 74 Fed. Reg. at 58,582. Because the proposed regulations would allow requesters to submit appeals electronically, NAHB does not believe a shorter period (assuming that would be the 30 days referenced in the analysis section of the NPRM), would pose a substantial hardship on a requester. Again, CEQ will need to clarify which appeal period it is proposing in these new regulations – the 30 or 60 days. NAHB would oppose any appeal period shorter than 30 days because that would impose a hardship on requesters, especially if there is a delay in receipt of a denial letter.

Fourth, another proposed change involves a "tolling" provision that pauses or delays the period for the agency to respond to a request if the agency needs to clarify the request for information or resolve issues with fees. Section 1515.6(a), 74 Fed. Reg. at 58,582. The period continues once the agency receives the requested additional information or clarification. *Id.* In the event of an information request denial the proposed regulations dictate that the agency "will specify the reasons for denial, including any FOIA exemption(s)," estimated volume of records or information withheld and provide the requester with information on filing an appeal. Section 1515.6(d), 74 Fed. Reg. at 58,582. Regarding these proposed changes, NAHB urges CEQ to embrace the spirit of the January 21, 2009 Presidential Memorandum and require its FOIA Officer to provide substantive reasons for any denial of information, and not merely cite one of the exemptions to justify a denial. Receiving meaningful information from an agency on its reasons for denying a FOIA request can help the requester better tailor its appeal to the denial, and refine its requests for data and information the agency possesses.

If it will take more than 10 days to process a FOIA request, CEQ has proposed assigning an individual tracking number to the request. Through this tracking number, a requester may then contact the assigned FOIA Public Liaison officer to secure information about the request, including an estimate on the date of completion. §1515.6(b), 74 Fed. Reg. at 58,582. However, if CEQ takes more than the allotted 20 days to rule on an appeal involving that same FOIA request, there is no ability to secure information on the progress of the appeal or anticipated ruling date. §1515.8(d), 74 Fed. Reg. at 58,582. In NAHB's experience, securing a final ruling on a FOIA appeal takes longer than 20 days.

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For consistency, and to facilitate greater transparency and openness, NAHB feels the tracking number assigned to the initial FOIA request should follow the request through final resolution. Through this tracking number, a requester would then be able to secure information on the progress of his or her appeal and plan accordingly.

Thus, NAHB requests that CEQ clarify the time period it seeks to use for appealing a denial of a FOIA request. NAHB also urges CEQ to utilize the tracking number for FOIA requests through the appeal process to keep requesters better informed of the status of their entire request. Moreover, NAHB encourages CEQ to adopt language in Section 1515.10(c) stating CEQ is committed to operating transparently and subject to public scrutiny and accountability.

With these clarifications and changes, NAHB believes CEQ's FOIA procedures will streamline and improve the process for both the agency and requester.

Sincerely,



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Staff Counsel
Legal Affairs



Jeffrey R. Augello
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cc: David S. Jaffe
Susan Asmus